



March 15, 2001

Ms. Betty DeLargy
Long, Burner, Parks, McClellan & DeLargy
P.O. Box 2212
Austin, Texas 78768-2212

OR2001-1022

Dear Ms. DeLargy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144980.

The Texas Health Insurance Risk Pool (the "pool"), which you represent, received two requests for bid packets submitted by candidates responding to a Request for Proposal issued by the pool for the performance of an audit of pool claims, as well as bid tabulation documents. Although the pool has taken no position as to the release of the requested information, you have notified each of the bidders whose documents have been requested, as well as certain other parties whose reports were used as exhibits to a proposal, of the request for information, pursuant to section 552.305 of the Government Code.¹ This office received responses from the Texas Life, Accident, Health, and Hospital Service Insurance Guaranty Association ("Guaranty"), Wolcott & Associates, Inc. ("Wolcott"), Milliman & Robertson, Inc. ("Milliman"), and Claim Technologies, Inc. ("Claim Technologies"). All of the private companies submitting comments to this office argue that a portion of the requested information pertaining to each respective company is excepted from disclosure under section 552.110 of the Government Code. In addition, Guaranty argues that a portion of its responsive information is excepted from disclosure under section 552.101 of the

¹See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances).

Government Code in conjunction with common law privacy. We have considered the arguments of all the parties and reviewed the submitted information.

First, we will address Guaranty's argument that policy numbers of insurance policyholders are excepted from disclosure under section 552.101 in conjunction with common law privacy, and that the policy numbers constitute trade secret information protected by section 552.110. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrines of common law and constitutional privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. Open Records Decision Nos. 600 (1992) (personal financial choices concerning insurance are generally confidential), 545 (1990) (common law privacy protects personal financial information not relating to the financial transaction between an individual and a governmental body), 523 (1989) (common law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (common law privacy protects assets and income source information).

Guaranty informs us that the policy numbers it seeks to withhold under common law privacy were included in a copy of an audit report prepared for Guaranty on claims processed but not yet paid by another insurance company, which claims Guaranty became responsible for paying due to the insolvency of the other company. This audit report was included as an exhibit to the proposal submitted to the pool by Administrative Insurance Management Services, Inc. ("AIMS"). Upon review of the submitted information containing the policy numbers, we conclude that such numbers constitute highly intimate information which is of no legitimate concern to the public. Therefore, we find that the policy numbers are excepted from disclosure under common law privacy and must be redacted from Exhibit B of the proposal submitted to the pool by AIMS. As we find that these numbers are excepted from disclosure under common law privacy, and because section 552.110 has not been argued for any information of AIMS or Guaranty other than policy numbers, we need not address Guaranty's argument under the trade secret branch of section 552.110.

We also note that a portion of the information submitted to this office contains social security numbers. Social security numbers may be withheld in some circumstances under section 552.101. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(D). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state

pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the pool pursuant to any provision of law, enacted on or after October 1, 1990.

We next address the arguments of Wolcott, Milliman, and Claim Technologies under section 552.110. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office has held that

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. See Open Records Decision No. 661 (1999).

The comments submitted by Wolcott, Milliman, and Claim Technologies, make only conclusory assertions or generalized allegations. We thus conclude that none of these entities have demonstrated that the information they seek to withhold is confidential as either a trade secret or as commercial or financial information under section 552.110 of the Government Code. Therefore, as these companies raise no other exceptions to disclosure, we find that the requested information pertaining to Wolcott, Milliman, and Claim Technologies must be released to the requestors. As none of the remaining third parties responded to the section 552.305 notice, we have no basis for concluding that their information is excepted from disclosure.

Finally, we note the assertion by Milliman that in the cover letter to the pool which accompanied their submission, Milliman made the request that the proposal and attachments be kept confidential. We also note that the pool identified certain information within several of the submitted proposals as information marked confidential or proprietary by the bidder. However, information is not confidential under the Public Information Act simply because the party submitting it anticipates or requests that it be kept confidential. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 479 (1987).

To summarize, the insurance policy numbers contained in Exhibit B of the proposal submitted to the pool by AIMS are excepted from disclosure under common law privacy and section 552.101, and must be redacted from the documents to be released. Any social security numbers obtained or maintained by the pool pursuant to any provision of law enacted on or after October 1, 1990 must also be withheld under section 552.101. All other information responsive to the two requests must be released to the requestors.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 144980

Encl. Submitted documents

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